Office Supreme Court, U.S.
FILED
FEB 28 1983
ALEXANDER L. STEVAS,
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82-1442

Miscellaneous Number ——

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

ROBERT WAYNE WILLIAMS
a/k/a WILLIE WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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& KATHMAN, PSC

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The questions presented for review are:

WHETHER THE COURTS BELOW ERRED IN FINDING SUFFICIENT EXIGENT CIRCUMSTANCES TO JUSTIFY THE WARRANTLESS SEARCH OF THE PETITIONER'S HOME IN LIGHT OF *STEAGALD* v. *UNITED STATES*, 451 U.S. 204 (1981).

WHETHER THE PETITIONER'S RIGHT TO A FAIR TRIAL WAS DENIED BY THE GOVERNMENT'S DESTRUCTION OF THE EVIDENCE PRIOR TO INDICTMENT.

WHETHER THE COURTS BELOW ERRED IN ALLOWING THE GOVERNMENT'S REQUESTED JURY INSTRUCTION NO. 17.

The parties to this proceeding are those contained in the caption of the case in this Court, namely:

ROBERT WAYNE WILLIAMS
a/k/a Willie Williams ..... Petitioner

UNITED STATES OF AMERICA .... Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

Miscellaneous Number ———

ROBERT WAYNE WILLIAMS
a/k/a WILLIE WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MAY IT PLEASE THE COURT:

Comes now Robert Wayne Williams, a/k/a Willie Williams, pursuant to Part V of the Rules of the Supreme Court and petitions the Supreme Court for a writ of Certiorari to the United States Court of Appeals for Sixth Circuit, to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 24, 1982. Petition for rehearing in this matter before the United States Court of Appeals was denied on January 7, 1983, and in support hereof, Petitioner states as follows:

The Opinion delivered in the Court below, that is, the United States Court of Appeals for the Sixth Circuit, affirmed Petitioner's conviction by per curiam, Opinion Number 82-5106 which has not yet been reported.

The United States Court of Appeals affirmed the conviction on November 24, 1982, by Judgment and Order Number 82-5106. A copy of the Order of the Court of Appeals, consisting of two pages, is appended hereto. A petition for Rehearing was filed on December 18, 1982, and said Petition was denied on January 7, 1983. No requests or orders concerning the granting of an extension for time in which to file the petition for certiorari have been made. The Supreme Court has jurisdiction to grant certiorari in this case. The Judgment sought to be reviewed was filed on November 24, 1982. The statutory provision believed to confer jurisdiction on this Court to review the judgment or decree in question by writ of certiorari is 28 USC § 1254 (1).

The following statutes are involved in this case: 18 USC 842 (j):

> (j) It shall be unlawful for any person to store any explosive material in a manner not in conformity with regulations promulgated by the Secretary. In promulgating such regulations, the Secretary shall take into consideration the class, type, and quantity of explosive materials to be stored, as well as the standards of safety and security recognized in the explosives industry.

21 USC § 841 (a) (1): . . . It shall be unlawful for any person knowingly or intentionally:

> (1) to . . . possess with intent to distribute . . . a controlled substance.

The following is a statement of the case concerning facts material to consideration to the question presented:

On September 9, 1981, Petitioner, Robert Wayne Williams, was indicted by a Federal Grand Jury of the United States District Court for the Eastern District of Kentucky, charging the Petitioner with improper storage of dynamite in violation of Title 18 USC § 842 (j) and with possession of a controlled substance with the intent to distribute such in violation of Title 21 U.S.C. §841 (a) (1).

The facts out of which these indictments arose are as follows:

On the afternoon of December 13, 1980, State Police Officers and Secret Service agents entered the residence of the Petitioner, Robert Wayne Williams, to execute a Federal arrest warrant for one Jesse C. Adams. Neither the state nor federal officers had a search warrant for the Petitioner's residence. In the course of the search for Mr. Adams, who was never found, the officers found an amount of marijuana on the second floor of Mr. Williams' house which at the time was occupied by Mr. Williams' brother-in-law, Paul Newman, and a Phillip Dale Courtney. One officer left the scene and secured a state search warrant authorizing the search for and seizure of the marijuana and other drugs in the residence. While searching for and seizing the marijuana, the officers discovered and seized nineteen (19) sticks of dynamite located in the closet of the dining room of the residence.

The petitioner was tried before a jury in the Eastern District of Kentucky, Frankfort Division, from February 1, 1982 to February 2, 1982. The Honorable William O. Bertelsman, Judge, who sustained the Defendant's Motion for Change of Venue, presided over the trial. The jury

returned a verdict of guilty as charged against the Petitioner, Robert Williams, on February 2, 1982.

On February 10, 1982, the Petitioner, Robert Wayne Williams, was sentenced by the Honorable Judge Bertelsman to one (1) year imprisonment on Count I and five (5) years imprisonment on Count II, said sentences to run concurrently for a total of five (5) years.

This is not a review of the Judgment of a state court so subdivision (h) of Rule 21 of the Rules of the Supreme Court is inapplicable.

The bases for federal jurisdiction in the District Court was 18 USC § 842 (j) and 21 USC § 841 (a) (1).

I.

This issue which the Petitioner desires to raise concerns the interpretation of *Steagald* v. *United States,* 451 U.S. 204 (1981) and its effects on the determination of probable cause to search premises without a search warrant.

The Supreme Court, in *Steagald* v. *United States,* supra, held that an entry into a third party's residence with an arrest warrant for another individual is not constitutionally permissible under the Fourth Amendment, absent exigent circumstances. The near exact fact situation of the Steagald case with the case at bar warrants special consideration. In *Steagald* v. *United States,* supra, Drug Enforcement Administration agents, pursuant to an arrest warrant for one Lyons entered the Petitioner's home to search for Lyons without first obtaining a search warrant. Lyons was not found. In the search of the house, however, the agent observed what he believed to be cocaine. Upon being informed of the discovery, Agent Goodowens sent an officer to obtain a search warrant, and in the meantime conducted

a second search of the house which uncovered additionally incriminating evidence.

The Supreme Court in *Steagald*, *supra*, stated "except in such special situations (absence of consent or exigent circumstances), we have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment, unless done pursuant to a warrant. *See Payton v. New York*, 445 U.S. 573 (1980); *Johnson v. United States*, 333 U.S. 10 (1948). Absent exigent circumstances, that threshold entrance (entrance to the house) may not reasonably be crossed without a warrant." *Payton*, *supra*.

A search warrant is issued upon the showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against unjustified intrusions of the police. *Steagald*, *supra*.

Thus, whether the arrest warrant issued in this case adequately safeguarded the interests protected by the Fourth Amendment depends upon what the warrant authorized the agents to do. To be sure, the warrant embodied the judicial finding that there was probable cause to believe that Jesse C. Adams had committed a felony, and the warrant therefore authorized officers to seize Adams. However, the agents sought to do more than use the warrant to arrest Adams in a public place or in his home; instead, they relied upon the warrant as legal authority to enter the home of the Petitioner, Williams, based on their belief that Jesse C. Adams might be a guest there. Regardless of how reasonable this belief may have been, it was never subjected to the detached scrutiny of a judicial officer. Thus, while the warrant in this case may have protected Adams from

an unreasonable seizure, it did absolutely nothing to protect Petitioner's privacy interest in being free from an unreasonable invasion and search of his home. Instead, Petitioner's only protection from an illegal entry and search was the agent's personal determination of probable cause. In the absence of circumstances, we have consistently held that such judicially untested determinations are not reliable enough to justify an entry into a person's home to arrest him without a warrant, or a search of a home for object in the absence of a search warrant. See *Steagald*, supra, at p. 1648.

The Petitioner realizes the corollary of the *Steagald* holding — that the requirement for a search warrant is excused by the presence of exigent circumstances or consent. However, the Defendant argues that the necessary exigent circumstances were not present nor was his consent ever given to allow the officers or agents to search his home.

Exigent circumstances refers generally to those situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search or seizure for which probable cause exists unless they act swiftly and without seeking prior judicial authorization.

Furthermore, in *Wallace* v. *King*, 626 F.2d 1157 (4th Cir., 1980), it was stated that exigent circumstances may properly include hot pursuit or justifiable fear of injury to persons or property if the arrest is delayed.

Among the factors deemed relevant in determining whether the circumstances are sufficiently exigent to permit a warrantless entry and arrest are: (1) Whether the entry sought to be made is in an area where a magistrate is or is not readily available, (2) Whether another officer is available to keep watch on the premises while an officer seeks a

search warrant, (3) The nature of the premises sought to be entered, (4) Whether the officers have reasonable cause to believe that the subject of the arrest warrant owns or resides therein. Finally, the Court concluded by stating that reasonable or probable warrant has been issued is on the premises, standing alone is not sufficient. *Wallace* supra, at 1161.

The first factor deals with the availability of a magistrate or judge from whom a search warrant may be obtained. In the present case, Kentucky State Trooper Daley, who was one of the primary people that instituted the search, testified that he was quite familiar with the fact that Campbell County District Court had a judge who is on call twenty-four (24) hours a day. He was also aware of the beeper system that court utilizes to contact the judges. In fact, after initially entering the residence of the Petitioner, Trooper Daley utilized that same system to procure a search warrant to again go back and continue searching the residence on Blange Road.

The second factor addresses the availability of backup — thus enabling an officer or agent to procure a search warrant. The estimates concerning the number of police officers at the Blange Road residence vary from ten (10) per Trooper Daley to thirty (30) per the Defendant Williams. Whichever the case, there was clearly more than enough agents/officers present to take the precautionary measures to secure the premises thus guaranteeing that the suspect Adams, could not escape and to assure the officer's own safety while awaiting the search warrant. Certainly, the officers could not have been concerned with the evidence having been destroyed, for at that time, the officers were unaware of any evidence or contraband in the Petitioner's residence.

The third factor deals with the nature of the premises sought to be entered. The evidence in this case was such that the Williams' residence was a two-story frame house with a front and back entrance. The residence was sitting out in the open and the nearest obstacle besides the other two surrounding houses was a woods approximately two hundred (200) feet away. The evidence further showed that the house was readily visible from the road and that if an individual was standing near the edge of the property, he could clearly observe the back yard. Finally, the only ingress to the house was by means of a one lane, dead-end gravel road running about one-half mile from its intersection with Route 8. From the above facts, there can remain no doubt that the premises, as far as the police were concerned, was an ideal place for a stake out. By utilizing the appropriate procedures, the police could have easily secured the premises and prevented the escape of Adams until a search warrant had been obtained. In fact, the premises were eventually secured after the initial search to obtain a search warrant.

The final factor to be considered is the officer's reasonable belief that the subject of the arrest warrant either owns or resides therein. There is no dispute that the house in question ever belonged to anyone but the Petitioner, Williams. There was some doubt as to whether or not J. C. Adams was at the Williams' residence. In fact, the Petitioner would like to point out that Jesse C. Adams was never found at the Petitioner's residence which casts considerable doubt on the reliability of the officer's information. Furthermore, the Defendant would suggest that the inherent mobility of persons indicates that in most situations the police may avoid altogether the need to obtain a search warrant simply by waiting for the suspect to leave the third party's home before attempting to arrest that

suspect. See *Steagald v. United States*, 451 U.S. 204 (1981) (footnote 14).

After analyzing the appropriate factors, the Petitioner would argue that the necessary exigent circumstances are not present in the case at bar, nor was consent ever given to justify the warrantless search of the Defendant's residence. The Petitioner additionally argues that the case falls squarely within the *Steagald* holding and, as such, the evidence seized should have been suppressed.

II.

Secondly, the Petitioner argues that the United States District Court for the Eastern District of Kentucky, as well as the Court of Appeals for the Sixth Circuit allowed a violation of the Petitioner's right to a fair trial in admitting testimony regarding destroyed evidence.

To better understand the nature of this argument, the Petitioner will set forth some additional facts that the Court would need to consider to adequately dispose of this issue. The Petitioner, Robert Williams, was initially charged in the Campbell District Court with trafficking in marijuana, being the identical factual basis in evidence in reference to the indictment returned against him in federal court. The case was tried on several different days, and the charges were subsequently dismissed.

After the case was dismissed, the evidence, being both the marijuana and all but a sample of the dynamite were destroyed. The evidence was destroyed by state and federal authorities. It should be pointed out that the Petitioner played no part in the destruction of the evidence. Some period of time, it is believed approximately two months after the evidence was destroyed, the *same* charges were

brought in the Federal District Court, for trafficking in marijuana and the dynamite charge.

When criminal evidence is lost or destroyed, the court must protect a complex of interests, some conflicting. A court's principal concern is to provide the accused an opportunity to produce and examine all relevant evidence to insure a fair trial. See *United States* v. *Loudhawk*, 628 F.2d 1139 (9th Cir., 1979).

The First Circuit, in *United States* v. *Picariello*, 568 F.2d 222 (1st Cir.,1978), articulated what it called a three-pronged examination when dealing with the issue of the destruction of the evidence. The three factors that the Court considers is: First, was the evidence material to the question of guilt or the degree of punishment; second, was the defendant prejudiced by its destruction; and third, was the government acting in good faith when it destroyed the evidence. In *Loudhawk*, supra, the Ninth Circuit set forth a more detailed analysis when dealing with the destruction issue.

> The proper balance is that between the quality of the Government's conduct and the degree of prejudice to the accused. The Government bears the burden of justifying its conduct and the defendant bears the burden of demonstrating prejudice. See also *United States* v. *Mays*, 549 F.2d 670 (9th Cir., 1977). In weighing the conduct of the Government, the court should inquire whether the evidence was lost or destroyed while in its custody, whether the Government acted in disregard for the interests of the accused, whether it was negligent in failing to adhere to established and reasonable standards of care for police and prosecutional functions, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification . . . It is relevant also to inquire whether the government attorneys prosecuting the case have participated in the events leading to loss or de-

> struction of the evidence, for prosecutorial action may bear upon existence of a motive to harm the accused.
>
> Against all this must be weighed the degree of prejudice to the defendant. In analyzing prejudice, the court must consider a wide number of factors including, without limitation, the centrality of the evidence to the case and its importance in establishing the elements of the crime or the motive or intent of the defendant, the probative value and reliability of the secondary or substitute evidence; the nature and probable weight of factual inferences or other demonstrations and kinds of proof allegedly lost to the accused; the probable effect on the jury from absence of the evidence, including dangers of unfounded speculation and bias that might result to the defendant if adequate presentation of the case requires explanation about the missing evidence.

The Petitioner contends that his right to due process has been prejudiced by the destruction of the evidence. In the present case, none of the material in question concerning the marijuana was saved to permit independent testing of the substance and thus the Petitioner was prevented from examining the primary evidence. However, in regards to the dynamite, the Petitioner was able to individually have the substance analyzed by his own chemist and, therefore, reached an independent determination of the validity of the Government's test. For some reason, the Government found it necessary to maintain samples of the dynamite, but not the marijuana. The petitioner is unable to offer any logical reason for such action. The Petitioner further contends that he has made a prima facie showing of prejudice and it is the Government's burden to show that the loss of the primary evidence was harmless. The destruction of the evidence, for which the Government is responsible, is the very act that makes identification of the

substances impossible and thus creates the prejudice to the Defendant. The fact is inescapable that relevant evidence was destroyed, and the very act of destruction prevents everyone from determining how helpful that evidence might have been to the Petitioner. The prejudice stems from the fact that the Government prevented the Petitioner from finding out for himself. See *United States* v. *Tsutagawa*, 500 F.2d 420 (9th Cir., 1974).

The Petitioner was also prejudiced to the extent that his inability to observe the destruction of the marijuana or to analyze samples of it deprived him of the opportunity to contest the government's conclusion that the substances were indeed marijuana. Furthermore, federal agents namely one Michael Restovich, were active participants in the proceedings in state court dealing with the destruction of the evidence and the Defendant's arrest, and, as such, should be held accountable for the act. Cf. *United States* v. *Picariello*, 586 F.2d 222 (1st Cir., 1978).

Clearly, under the Supreme Court case of *Lustig* v. *United States*, 338 U.S. 74, 69 S.Ct. 1372 (1949), there can be no doubt that there was federal participation in the search and in the subsequent destruction.

In *Lustig*, supra, the Court stated, "The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter . . . " By the testimony of the Government's own witnesses, namely Agent Restovich and Trooper Dailey, there can remain no doubt that the federal government was actively involved in the search of the Petitioner's residence. Likewise, it is the FBI's own information that triggered the search of the Defendant's home and they were the ones that requested assistance from the state troopers.

Finally, the Defendant contends that the secondary evidence adduced at trial was neither probative nor reliable. Trooper Daley testified that when he entered the upstairs of the residence, there *appeared* to be a substance *similar* to that of marijuana scattered throughout the carpet. Likewise, only one test for each sample was run by the Northern Kentucky Regional Laboratory to determine if the substance found was, in fact, marijuana. Cf *United States* v. *Traylor,* 656 F.2d 1326 (1981) (Four tests run on substance before concluding that it was 45% cocaine.)

Thus, the Defendant contends that the Government's destruction of the evidence chilled his rights to due process by prejudicing his ability to defend and, therefore, denying him a fair trial.

The third issue which Petitioner desires to raise concerns the error in giving the Government's Jury Instruction No. 17 in contradiction to the law.

The Petitioner objected to the giving of one of the Government's requested jury instructions, specifically Instruction No. 17. The pertinent instruction reads as follows:

> In reference to Count I, you are instructed that the Defendant did not have to know or be aware of the Regulations of the Secretary pertaining to the storage of dynamite. However, you must feel that the Defendant knew the dynamite was in the closet. In regards to the Defendant's knowledge you are instructed that a person cannot void responsibility by closing his eyes to the obvious and that a defendant can be held responsible for the acts of others if he was aware of those acts. In other words, in order to find the defendant guilty under Count 1 you must find beyond a reasonable doubt that the defendant was aware that the dynamite was in the closet.

The Petitioner timely objected to the giving of this requested instruction. It did not accurately state the law. The requested instruction was given by the Court.

The specific statute in question is Title 18 USC § 842 (j), which reads as follows:

> It shall be unlawful for any person to store any explosive material in a manner not in conformity with regulations promulgated by the Secretary . . .

It is the Petitioner's contention that to sustain a conviction under this statute, it is necessary to show that the Defendant either possessed, i.e. owned, the dynamite, or had physical control over it, a mere showing that the Defendant was aware that dynamite *may* be stored in his premises is insufficient. As defense counsel stated:

> I think if you're going to possess something, you have to control it and have the intent to control it. Just because it's there — if you're there doesn't mean you are guilty of it.

The statute in question seems to offer little or no guidance on this issue. The statute, its predecessor, Public Law 91-452, 84 Stat. 952, and the regulation itself simply delineate the offense as "No person shall *store* any explosive material . . . " (Emphasis added). If the statute is held to mean awareness, as opposed to ownership, then anybody could be guilty of the offense when they entered someone's premises knowing that dynamite was being stored there.

There was testimony in the present case that the Petitioner was no longer living at the Blange Road residence because of marital difficulties, nevertheless, he still considered that place his home. Testimony further indicated that he visited his residence on Blange Road approximately once a week on Saturday usually to take groceries and visit with his children.

The Petitioner argues that the Court should have directed a verdict in regards to the dynamite charge since there was no proof whatsoever submitted that imputed knowledge or use or possession or anything to do with the dynamite on the Defendant. Likewise, the testimony was such that the nineteen (19) sticks of dynamite were found in a box in a bag in the dining room closet with a drop cloth over the closet since there was no door. Thus, the facts clearly indicate that the dynamite was not in plain view when the evidence in question was found. As earlier indicated, the Petitioner, his wife, his three children, David Paul Newman and Philip Dale Courtney all lived at the residence and had free access to the entire residence. Furthermore, David Paul Newman and Philip Dale Courtney are parties of less than respectable characters.

The Petitioner asserts that the Government introduced no proof whatsoever that would give any indication that the Petitioner himself had stored the dynamite in his premises, or knew that such dynamite was being stored, and, as such, the Court erred in failing to direct a verdict in his favor on the dynamite charge.

For the foregoing reasons, the Appellant respectfully urges that this petition be granted.

Respectfully submitted,

By

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IN THE
SUPREME COURT OF THE UNITED STATES
———— TERM 1982

MISCELLANEOUS NO. ————

ROBERT WAYNE WILLIAMS,
a/k/a WILLIE WILLIAMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

I hereby certify that on this the ..... day of ....., 198..., copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit were mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; United States Attorney for the Eastern District of Kentucky; and Mr. John P. Hehman, Clerk, United States Court of Appeals, Cincinnati, Ohio 45202. I further certify that all parties required to be served have been served.

BUSALD, FUNK, ZEVELY, BERGER
& KATHMAN, PSC

BY: .....

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APPENDIX

No. 82-5106

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed November 24, 1982]

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ROBERT WAYNE WILLIAMS, a/k/a WILLIE WILLIAMS *Defendant-Appellant.*	ORDER

Before: EDWARDS, Chief Judge, MERRITT, Circuit Judge and VAN PELT,* Senior District Judge.

On receipt and consideration of an appeal in the above-styled case; and

On review of the lengthy record which led to defendant-appellant's conviction for possession of a controlled substance; and

* Honorable Robert Van Pelt, Senior Judge, U.S. District Court for the District of Nebraska, sitting by designation.

Knowingly and unlawfully storing explosive materials in violation of federal law; and

Noting the exigent circumstances which existed for entry into the home which was searched, along with the officer's possession of an arrest warrant for defendant; and

Recognizing that *Steagald* v. *United States,* 451 U.S. 204 1981), is the critical authority at this time on the question of validity of the search,

Now, therefore, we hold that the exigent circumstances listed below were sufficient to justify entry into the domicile:

> A fugitive, J. C. Adams, was wanted for drug charges, counterfeit charges, and for *escaping from police custody.* The officers involved had an arrest warrant for Adams who, before his escape, had been arrested in possession of $17,000 of counterfeit money.
>
> Adams was reported to be armed and dangerous.
>
> Defendant, the owner of the residence concerned, was believed to be armed and dangerous.
>
> The fugitive was reported to be leaving the residence and the state "within the hour."
>
> As the police approached the house, they were open and vulnerable.

The judgment of the District Court is affirmed.

Entered by order of the Court

JOHN P. HEHMAN
Clerk

No. 82-5106

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed January 7, 1983]

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ROBERT WAYNE WILLIAMS,
a/k/a WILLIE WILLIAMS,
Defendant-Appellant.

ORDER

Before: EDWARDS, Chief Judge, MERRITT, Circuit Judge and VAN PELT,* Senior District Judge.

On receipt and consideration of a petition for rehearing; and

Noting therein no issue of substance presented which was not taken fully into account prior to issuance of the court's opinion,

Now, therefore, said petition is denied.

Entered by order of the court

JOHN P. HEHMAN
Clerk

* Honorable Robert Van Pelt, Senior Judge, U.S. District Court for the District of Nebraska, sitting by designation.

FILED
MAY 16 1983
ALEXANDER L. STEVAS, CLERK

No. 82-1442

In the Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT WAYNE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether exigent circumstances justified the warrantless search of petitioner's home for a fugitive who was the subject of an arrest warrant and was reported to be armed and dangerous and intending to flee the state within the hour.

2. Whether the destruction by state authorities of the marijuana and dynamite found in petitioner's home deprived him of a fair trial.

3. Whether the district court properly instructed the jury concerning petitioner's knowledge of the dynamite found in his closet.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1442

ROBERT WAYNE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1982. A petition for rehearing was denied on January 7, 1983 (Pet. App. 3a). The petition for a writ of certiorari was filed on February 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of storing dynamite, in violation of 18 U.S.C. 842(j) (Count I), and possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Count II). He

was sentenced to concurrent terms of one year's imprisonment on Count I and five years' imprisonment on Count II. The court of appeals affirmed in a per curiam order (Pet. App. 1a-2a).

1. On Saturday, December 13, 1980, Secret Service Agent Michael Restovich received information from the FBI that a fugitive, J.C. Adams, reportedly armed and dangerous, was at petitioner's residence (C.A. App. 12-13). Adams had escaped from the Taylor Mill Police Department on December 11, 1980, following his arrest for possession of substantial amounts of counterfeit money (*id.* at 13, 18). Agent Restovich was also told that Adams was planning to flee the state within the hour (*id.* at 18). In addition, Restovich was advised that petitioner also was believed to be armed and dangerous (*id.* at 13, 18).

Upon receiving this information, Agent Restovich immediately called upon the Kentucky State Police for assistance because a state arrest warrant for Adams had been issued on December 12, 1980, the day after his escape. Restovich and a Kentucky State Trooper then proceeded to petitioner's residence (C.A. App. 13). Restovich did not obtain a search warrant because under then-prevailing Sixth Circuit law a search warrant was not required to execute an arrest warrant for a person located at a third party's residence (*ibid.*). See *Steagald* v. *United States*, 451 U.S. 204, 208 n.3 (1981), citing *United States* v. *McKinney*, 379 F.2d 259, 262-263 (6th Cir. 1967).

While awaiting the arrival of additional Secret Service Agents on the road near petitioner's home, Agent Restovich and Kentucky State Trooper James Daley observed a car driven by petitioner's brother-in-law, Paul Newman. Upon seeing the officers' marked car, Newman stopped his vehicle, put it into reverse, and began backing up the road. Restovich pursued Newman and stopped his vehicle;

Newman then identified a picture of Adams. Newman said that Adams had spent the previous night in petitioner's home, but Newman did not know if Adams was still there (C.A. App. 13).

When federal and state officers arrived at petitioner's home, they ordered everyone onto the front porch and asked about Adams. Petitioner replied that Adams was not there and said that he had not seen Adams for two weeks. Because the officers had information that Adams and petitioner were armed and dangerous, they considered their position on the porch to be open and vulnerable. Without petitioner's consent, Trooper Daley entered petitioner's residence and saw marijuana "sort of laying around" (C.A. App. 12). Upon finding a burlap sack containing marijuana in the attic area, Trooper Daley secured a state search warrant and found additional marijuana, as well as dynamite, in the dining room closet (*id.* at 12).

2. Prior to trial, petitioner moved to suppress the marijuana and dynamite because the officers did not have a search warrant when they entered petitioner's residence. The magistrate, finding that there were exigent circumstances, concluded (C.A. App. 15) that the warrant requirement announced in *Steagald* v. *United States, supra*, did not apply. The magistrate did not reach a separate conclusion concerning the retroactive application of *Steagald*; he simply observed that that question would be moot if the district court were to agree that exigent circumstances were present, but noted that "search and seizure opinions in the past have not been applied on a retroactive basis" (C.A. App. 15). The district court adopted the magistrate's findings of fact and conclusions of law (*id.* at 17-19).

3. The state police took custody of the seized marijuana and turned it over to a state police chemist for analysis (C.A. App. 84-86). Petitioner was then charged under state law with trafficking in drugs. The state court dismissed the

charges and ordered destruction of the marijuana (*id.* at 88, 93-94, 96, 100-102). When state police burned the marijuana in compliance with the state court's order, they were unaware of any forthcoming federal charges (*id.* at 87-88, 95).

The dynamite was extremely dangerous because it had crystallized and had become very hard. Accordingly, it too was destroyed the day after it was seized (1 Tr. 103[1]); however, a sample of the dynamite and a wrapper were sent to the Bureau of Alcohol, Tobacco and Firearms crime lab for analysis (C.A. App. 48-51). In addition, petitioner sought and received permission to have the dynamite analyzed by his own chemist (2 Tr. 123[2]).

ARGUMENT

1. Petitioner first contends (Pet. 4-9) that the search of his home without a warrant was unreasonable, disputing the existence of exigent circumstances. The courts below correctly rejected this fact-bound claim, and further review by this Court is unwarranted.[3]

"Exigent circumstances" refers generally to those situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search or seizure, for which probable cause exists, unless they act swiftly and without the delay entailed in seeking prior judicial authorization. *United States* v. *Campbell*, 581 F.2d 22, 25 (2d Cir. 1978). The likelihood that the person sought is armed and ready to

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[1]"1 Tr." refers to the transcript of the first day of trial.

[2]"2 Tr." refers to the transcript of the second day of trial.

[3]Petitioner raises no issue concerning the retroactive application of *Steagald;* rather, he disputes only the lower courts' findings of exigent circumstances. Moreover, the court of appeals held (Pet. App. 2a) that *Steagald* is the "critical authority at this time on the question of the validity of the search," and thus it based its affirmance on the district court's factual finding of exigent circumstances.

flee, which increases the chances of an armed confrontation that could result in extreme danger to law enforcement officers and the general public, has long been recognized as a crucial factor in determining the presence of exigent circumstances. See *Wallace* v. *King*, 626 F.2d 1157, 1161 (4th Cir. 1980), cert. denied, 451 U.S. 969 (1981); *United States* v. *Williams*, 612 F.2d 735, 739 (3d Cir. 1979), cert. denied, 445 U.S. 934 (1980); *Dorman* v. *United States*, 435 F.2d 385, 392-393 (D.C. Cir. 1970).

In the instant case there was probable cause to believe that a fugitive felon who had escaped but two days before was at petitioner's home. The fugitive was reported to be armed and dangerous, as was petitioner himself. The fugitive was also reported to be planning to leave the state within the hour.[4] When the police approached petitioner's home they were vulnerable to possible attack by at least one armed escapee. Under these circumstances, the finding of exigency by the magistrate, the district court, and the court of appeals was amply justified.

2. Next, petitioner contends (Pet. 9-13) that his trial was prejudiced by the destruction of evidence. This claim is totally lacking in merit.

In *United States* v. *Picariello*, 568 F.2d 222, 227 (1st Cir. 1978), the court set forth three factors to consider when evidence is destroyed — (1) the materiality of the evidence, (2) whether the defendant was prejudiced and (3) whether

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[4]In words applicable at least in part to the instant case, this Court pointed out in *Steagald*, *supra*, 451 U.S. at 221-222, that "a warrantless entry of a home would be justified if the police were in 'hot pursuit' of a fugitive. See *United States* v. *Santana*, 427 U.S. 38, 42-43 (1976); *Warden* v. *Hayden*, 387 U.S. 294 (1967)."

the government was acting in good faith.[5] Applying that test here, it is clear that petitioner received a fair trial.

Contrary to petitioner's assertion that "[t]he evidence was destroyed by state and federal authorities" (Pet. 9), the federal government had no part in the destruction of the evidence. The dynamite was destroyed the day after its seizure by the Newport, Kentucky, Police Bomb Squad, because of its deteriorated and dangerous condition (1 Tr. 103). Following suppression of the marijuana evidence at petitioner's state trial, the state judge ordered it destroyed. It was then destroyed by state authorities who were unaware of any forthcoming federal charges, and no federal authority was present or aware that the marijuana was being destroyed (see pages 3-4, *supra*). Clearly, nothing in the federal government's conduct prejudiced petitioner.

Moreover, petitioner's claim of prejudice from the destruction of the marijuana is somewhat confusing. At trial, petitioner testified in his own defense that he did not know the marijuana was in his house (2 Tr. 29, 37, 39, 46); thus, the nature of the substance was really irrelevant to his defense. Second, petitioner's counsel did not cross-examine the state chemist about the tests he ran and, in fact, advised the trial court that he did not intend to question the chemist "as to whether or not it's marijuana" (C.A. App. 52). Third, two officers testified without objection that what they saw in petitioner's house was marijuana (1 Tr. 67-68, 124). Finally, petitioner's counsel made great use of the marijuana destruction in his closing argument, claiming it was "unfair" and telling the jury that it should acquit petitioner because the government did not produce the evidence (2 Tr. 140-142, 150). In short, it appears that the destruction of the

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[5]See also *United States* v. *Traylor*, 656 F.2d 1326, 1334-1335 (9th Cir. 1981); *United States* v. *Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir.) (en banc), cert. denied, 445 U.S. 917 (1980).

marijuana aided petitioner's defense strategy, enabling him to ask the jury to acquit him because of this "unfair" and "oppressive" prosecution (2 Tr. 140). On these facts, there is no basis for petitioner's claim of prejudice.

3. Finally, petitioner contends (Pet. 13-15) that the trial court's Instruction No. 17 on the dynamite count was clearly erroneous. This contention is without merit or support in the law.

Section 842(j) of Title 18 provides in pertinent part (emphasis added):

> It shall be unlawful for any person to *store* any explosive material in a manner not in conformity with regulations promulgated by the Secretary. * * *

The trial judge instructed the jury:

> In reference to Count I, you are instructed that the defendant did not have to know or be aware of the regulations of the secretary pertaining to the storage of dynamite.
>
> However, you must believe that the defendant knew the dynamite was in the closet. In regards to the defendant's knowlege, you are instructed that a person cannot avoid responsibility by closing his eyes to the obvious and that a defendant can be held responsible for the acts of others if he was aware of those acts; in other words to find the defendant guilty under Count I, you must find beyond a reasonable doubt that the defendant was aware that the dynamite was in the closet.[6]

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[6]The jury instruction is reproduced in a separate volume of the transcript of the trial entitled "Excerpted Portion of Instruction to the Jury," at 17 (Feb. 2, 1982).

Petitioner objected to this instruction (C.A. App. 128). Petitioner cites no authority to support his contention (Pet. 14) that one charged under Section 842(j) with storing dynamite in his own home must *own* the explosive material in question or have some greater degree of physical control over it than a homeowner possesses over the contents of his residence generally. Nor does there appear to be any statutory basis for such a claim, for as the trial judge correctly pointed out, "you can store it without owning it" (2 Tr. 119). Nor, contrary to petitioner's argument, does the instruction suggest that a "mere showing that the Defendant was aware that dynamite *may* be stored in his premises * * * would be sufficient" (Pet. 14). Rather, the court's instruction clearly required the jury to find that petitioner "knew the dynamite was in the closet" or "that [petitioner] was aware that the dynamite was in the closet." Knowledge or awareness that the dynamite was stored in the closet of his own home clearly placed petitioner within the purview of 18 U.S.C. 842(j).[7]

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[7]This issue does not warrant independent review in any event in light of the concurrent sentence doctrine. See *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973). Petitioner was sentenced to concurrent sentences of one year on the dynamite count and five years on the marijuana count.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1983

DOJ-1983-05